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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1384

CLAY COMMUNICATIONS, INC., *Petitioner*

v.

JAMES M. SPROUSE, *Respondent*

On Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner believes that the constitutional questions presented in its petition are fairly developed in the petition. Further argument by petitioner would be inappropriate under the rules of this Court except to point out certain arguments made by respondent which are either (a) not supported by the record, or (b) involve an issue on which evidence was conflicting and which was resolved in petitioner's favor by the Supreme Court of Appeals of West Virginia.

Respondent argues [1] that petitioner's news stories of October 24 and 25, 1968, insofar as they estimated Sel-

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[1] Respondent's Brief will be cited as (Resp. Br. —). The Opinion of the West Virginia Supreme Court of Appeals, which is Appendix A to the Petition for Certiorari, will be referred to as (P. App. A. —).

met's remaining land acreage to be 400 acres, were deliberate or reckless falsehoods, basing that argument on the following false or partially false assertions:

Assertion No. 1. "The original purchase, which included less than 2600 acres, was obtained from Henry Regnery on March 12, 1966, for $134,620 (R. 192)." (Resp. Br. 5).

There is no evidence in the Record at p. 192 or elsewhere that the quantity of land purchased was less than approximately 2,900 acres. Moreover, the Supreme Court of Appeals accepted the 2,900 acre figure (P. App. A. p. 10a).

Assertion No. 2. "Oliver did not testify, but Marshall's testimony established actual knowledge by Mellace that some of the information he published was false." (Resp. Br. 7).

Oliver, who was Marshall's superior, did testify. (R. 544-552). He testified that, insofar as the Daily Mail publications of October 24 and October 25, 1968, attributed statements to him or to the Forest Service, the stories were true and correct. (R. 547); that Mellace was in his office during the entire time of the visit to the Forest Service headquarters; that for a part of the meeting between Oliver and Mellace, he (Oliver) called in Marvin Marshall, a subordinate, (R. 548); that he did not recall any discussion between Mellace and Marshall regarding the quantity of land Selmet had remaining (R. 549); and that the Forest Service would not have been interested or concerned with what land Selmet Properties might have had left after the conveyance to Nature Conservancy (R. 550).

Assertion No. 3. "Marshall insisted to Mellace . . . that there was less than 100 acres at $500 per acre. . . .

Despite this, Mellace quoted the Forest Service official as indicating 400 acres at $1,000 per acre." (Resp. Br. 7).

Mellace's stories appear in the Petition for Certiorari as an Appendix to the Opinion of the Supreme Court of Appeals at pages 41a through 54a. It is a misstatement of the record to say that Mellace attributed to a Forest Service official any statement regarding the quantity of Selmet's remaining land or its value or quoted such an official in that regard.

Assertion No. 4. "The Court below and the jury were equally warranted in considering that in view of the knowledge gleaned from conversations with Forest Service officials the defendant published false statements with a 'high degree of awareness of . . . probable falsity'." (Resp. Br. 14).

Marshall's testimony that he told Mellace, during the meeting with Oliver that approximately 100 acres was the only land remaining in Selmet's ownership was disputed by both Oliver (R. 549) and Mellace (R. 315-316, 602). The Court below expressly found that Mellace acted in good faith in estimating that Selmet had over 400 acres of land remaining (P. App. A. 10a, 11a).[2]

Assertion No. 5. "The newspaper editors testified that they knew at the time of publication that there was nothing improper involved in plaintiff's corporate land involvement (R. 330)." (Resp. Br. 10, 11).

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[2] The Court below said: "The plaintiff was unable to negate the fact that subtraction of the out conveyances of record from the total acreage stated in the original Regnery tract deed appeared to leave approximately 400 remaining acres, and therefore, Mellace's good faith belief in his calculations at the time of publication was not called into question."

As we read the record at page 330, Mellace merely said that, as far as he knew, Sprouse's land involvement in Pendleton County was basically legitimate.[3]

DAMAGES

Respondent asserts "The defendant, however, was the party introducing the issue of the election loss on cross examination of the plaintiff (R. 457, 524)." (Resp. Br. 12).

Respondent's direct testimony (R. 445-453), which is the only evidence of injury, relates primarily to damage to his political campaign. Respondent's counsel also raised the election loss in his opening statement to the jury (R. 197).[4]

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[3] The exchange between Mellace and Sprouse's counsel on page 330 of the Record is as follows:

"Could you answer my question, you wouldn't take up the space on the front page of your newspaper if there was nothing irregular about the transaction.

A. Surely not.

Q. The purpose of these two editions, 24 October 1965 and 25 October 1965 was to convey to the readers that something was rotten in Denmark, so to speak?

A. It was to convey to the readers as many facts as we could about this whole transaction.

Q. Mr. Mellace, absent any available knowledge and absent any inside information, do you admit that this was a legitimate real estate transaction?

A. Which one?

Q. The one of Judge Sprouse in Pendleton County, buying property and selling it?

A. It was basically legitimate as far as I know, and I never said otherwise."

[4] Respondent's counsel said: "We will show that it did do him great injury. The election, of course, was won by his opponent and there is no evidence, one way or the other, but you can judge for yourself what impact this would have in the climate of the times. . . ."

THE EDITORIAL

The editorial reproduced as Appendix A to Respondent's Brief was complained of in this action and was allowed to go to the jury by the trial court. Neither in its Opinion nor in the Appendix to its Opinion did the Supreme Court of Appeals of West Virginia mention the editorial. The editorial was an expression of opinion and, as such, not actionable. The Supreme Court of Appeals clearly recognized this fact and therefore deemed consideration of the editorial unnecessary.

CONCLUSION

Of equal or greater significance than respondent's misreading of the Record is his interpretation of *Curtis Publishing Co.* v. *Butts* as holding that an intent to injure a political candidate is "evidence of recklessness and willful disregard for truth" (Resp. Br. 14) and that respondent's uncorroborated testimony supports a $250,000 compensatory award under *Gertz* v. *Welch*. Respondent's brief further demonstrates the necessity for this Court to review and correct the erroneous resolution by the West Virginia Court of the significant First Amendment issues involved in this case.

Respectfully submitted,

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